

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE TRINIDAD GUTIERREZ,

Defendant and Appellant.

F057959

(Super. Ct. No. SF013952A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Jerold L. Turner, Judge.

John J. Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

-ooOoo-

*Before Gomes, Acting P.J., Kane, J., Poochigian, J.

On July 11, 2008, appellant Jose Trinidad Gutierrez, pursuant to a plea agreement, pled no contest to kidnapping (Pen. Code, § 207)¹ and admitted an enhancement allegation that he committed that offense for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1).) Under the terms of the plea agreement, appellant was to receive a prison term of 18 years, consisting of the eight-year upper term on the substantive offense and 10 years on the gang enhancement.

On August 27, 2008, at the time set for sentencing, appellant informed the court he wanted to withdraw his plea, and on November 18, 2008, he filed a notice of motion to withdraw his plea. On January 29, 2009, while that motion was pending, defense counsel informed the court he believed appellant could be mentally incompetent. (§ 1368.) On March 12, 2009, the court found, based on its consideration of a psychological report, appellant competent to stand trial.

On May 20, 2009, the parties agreed to a modification of the plea agreement, and pursuant to that modification, appellant dropped his motion to withdraw his plea and admitted two prior prison term enhancement allegations (§ 667.5, subd. (b).) The court imposed a prison term of 17 years, consisting of the five-year midterm on the substantive offense, 10 years on the gang enhancement and one year on each of the two prior prison term enhancements.

On June 19, 2009, appellant filed a timely a notice of appeal, in which he requested the court issue a certificate of probable cause (§ 1237.5). On June 29, 2009, the court denied that request.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that

¹ All statutory references are to the Penal Code.

this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Appellant, in response to this court's invitation to submit additional briefing, has filed a supplemental brief in which he makes three arguments.

First, he contends the court erred in denying his request for a certificate of probable cause. However, an order denying a request for a certificate of probable is not itself an appealable order. (*People v. Kraus* (1975) 47 Cal.App.3d 568, 577-578.) Rather, it may only be challenged by writ of mandate. (*In re Brown* (1973) 9 Cal.3d 679, 683, disapproved on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7.) Therefore, appellant's claim that the court erred in denying his request for a certificate of probable cause is not properly before this court.

Second, as best we can determine, appellant contends the court erred in imposing the gang enhancement. This contention also is not cognizable on appeal. ““By pleading guilty, a defendant admits the sufficiency of the evidence establishing the crime, and is therefore not entitled to a review on the merits. [Citations.] ‘[I]ssues which merely go to the guilt or innocence of a defendant are “removed from consideration” by entry of the plea.’ [Citation.]”” (*People v. Moore* (2003) 105 Cal.App.4th 94, 99.) And “Admissions of enhancements are subject to the same principles as guilty pleas.” (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785.) Thus, appellant's challenge to the gang enhancement is foreclosed by his admission.

Finally, appellant argues that his plea of no contest to the kidnapping charge and his admission of the gang enhancement allegation were the result of ineffective assistance of counsel. This argument is, in essence, a challenge to the validity of the plea and therefore, because the court did not issue a certificate of probable cause, is not cognizable on this appeal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76 [challenge to validity of plea foreclosed by absence of certificate of probable cause]; *People v. Stubbs* (1998) 61 Cal.App.4th 243 [claim of ineffective assistance occurring prior to plea went to validity

of plea and therefore not cognizable on appeal in absence of compliance with certificate of probable cause requirements].)

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

The judgment is affirmed.